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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 194

MARVIN DAYAN, also known as MARVIN DAYON,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Brief of Respondent in Opposition to Granting of Writ of Certiorari.

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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Brief of Respondent in Opposition to Granting of Writ of Certiorari.

Statement.

On April 24, 1959, the petitioner herein, was charged with having thrice violated Section 2141 of the California Business and Professions Code in Counts I, II and II of the Complaint. Count IV in which he was charged with a violation of Section 4143 Business and Professions Code, was dismissed on motion by the People. The petitioner was represented by counsel at the trial by jury.

The judgment of the jury was that of conviction on each count. An appeal was taken to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. The judgments of conviction were affirmed. The petitioner now seeks a Writ of Certiorari in this court.

I.

A Chiropractor May Be Validly Prosecuted Under Section 2141 of the Business and Professions Code of the State of California.

1. The Pertinent Provisions and Statutes of California Law.

Section 2141 of the Business and Professions Code provides that:

> "Any person who practices or attempts to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this State, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor."

The certificates provided in Chapter 5 to which Section 2141 refers, do not include those issued to chiropractors. The chiropractors are granted licenses under Division 2 of Chapter 2 of the Business and Professions Code.

The privilege of practicing the chiropractic arts in California emanates from an initiative, known as the Chiropractic Act, which was passed by California in 1922 (now codified—Sections 1000-1001, Division 2, Chapter 2, Business and Professions Code of the State of California).

The substantial language of Section 2141, under which the petitioner was prosecuted, is found under the

Medical Practices Act as amended in 1917 (Stats. 1917, Ch. 81, p. 114—[Appendix A]). It preceded the Chiropractic initiative.

When called upon to interpret the effect of the Chiropractic Act upon this certain provision, Section 2141 of the Business and Professions Code, originally of the Medical Practices Act, the highest state court to hear such matters, the Appellate Department of the Superior Court, gave it the following construction:

> "The lack of such license is not stated by the last-mentioned act (or the code) as a part of the definition of the offense there denounced. The question of such a license enters into the case only by reason of the separate Chiropractic Act. No part of the language of the Medical Practice Act was expressly repealed, or removed or deleted from that act by the Chiropractic Act. . . . The operative effect of the Chiropractic Act is the same as that of an exception or limiting proviso placed in the same act with a prohibition but not made a part of the definition or description of the offense. . . ."
>
> *People v. Fowler*, 32 Cal. App. 2d Supp. 737, 742, 84 P. 2d 326.

As a matter of statutory construction the chiropractic license was held not to be a "license" under Section 2141. Furthermore, it was found that Section 2141 was not repealed by the Chiropractic Act.

The court recognized that the chiropractic license was a valid defense to Section 2141 for all acts properly authorized under the Chiropractic Act. For *ultra vires*

acts, however, a chiropractor was answerable under Section 2141. (*People v. Fozeler, supra*; *People v. Mangiagli*, 97 Cal. App. 2d Supp. 935, 938, 218 P. 2d 1025.)

The court determined what then was *ultra vires*. It found that *chiropractic*, as it was defined in 1922 and as taught in 1922, set the boundaries. (*People v. Fozeler, supra*; *People v. Mangiagli, supra*; construing Sections 1000-7, Business and Professions Code of the State of California.)

Pertinent to the case at bar, it was found in the *Mangiagli* case, *supra*, that injections were a part of materia medica and that it was verboten for a chiropractor to dispense them under Section 7, Chiropractic Act (Sections 1000-7, Business and Professions Code);[1] that they were simply beyond the authorized scope of his healing act, and that a chiropractor could be convicted therefor under Section 2141.

The District Court of Appeal, Second Appellate District, State of California, approved, in a minute order, the rule of law established by the *Fozeler* and *Mangiagli* cases (Crim. 6798, *In re Dayon* on Habeas Corpus, 172 A. C. A. No. 2, p. 5 of the Minutes [Appendix B]). The Supreme Court of the State of California denied a writ of habeas corpus of the petitioner herein on the same grounds herein raised.

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[1]Inasmuch as injections are beyond the scope of a chiropractor's license, the trial court in People v. Dayon, No. 98050, held properly that evidence of the *substance* injected *into* the complaining witnesses was immaterial.

2. The State Court's Construction of State Statutes Is Binding Upon the Federal Courts.

A. *It Is a Basic Constitutional Principle That the Construction of a State's Statutes by Its Court of Last Resort Must Be Accepted by the Federal Courts.*

Williams v. Oklahoma, 358 U. S. 576, 3 L. Ed. 2d 516;

Farncourt v. Denver, 252 U. S. 7, 64 L. Ed. 424;

Speiser v. Randall, 357 U. S. 513, 2 L. Ed. 2d 1460;

Albertson v. Millard, 345 U. S. 242, 97 L. Ed. 984.

B. *This Court Is Not Concerned With Petitioner's Allegation That The State Chiropractic Act Repealed the Provisions of California Business and Professions Code, Section 2141, as Applied to Chiropractors.*

The decision of the highest court of a state as to whether a statute has repealed the provisions of a former act is conclusive upon the federal courts.

Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. Ed. 97;

Kibbe v. Kibbe, 93 U. S. 674, 23 L. Ed. 1005;

Ughbanks v. Armstrong, 208 U. S. 481, 52 L. Ed. 582.

Whether one state statute excludes another, or both are to be construed together, is a matter of state law on which the decision of the state court is conclusive in the federal courts.

Hebert v. Louisiana, 272 U. S. 312, 71 L. Ed. 270.

C. *It Is the Province of the Courts of a Particular State to Determine What Its Laws Are, and to Determine Whether Particular Acts on the Part of an Alleged Offender Constitute a Crime Under Such Laws.*

Applegard v. Massachusetts, 203 U. S. 222, 51 L. Ed. 161;

Hazard v. Fleming, 191 U. S. 126, 48 L. Ed. 121;

Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28, 92 L. Ed. 455;

International Union etc. v. O'Brien, 339 U. S. 454, 94 L. Ed. 978.

II.

Section 2141, Business and Professions Code, Is Sufficiently Definite and Certain, and Therefore Is Not Repugnant to the Substantive Guarantees of the Due Process Clause of the 14th Amendment.

A. The Notice Requirement Is Not Offended by Judicial Interpretation.

Petitioner's contention that the California courts, under the *Isaacs* and *Mangiaoli* cases, *supra*, have created a "constructive crime" is unwarranted. Such cases merely hold that evidence of certain acts is sufficient to constitute guilt under the statute.

This determination arises in every criminal case.

"The law is full of instances where a man's fate depends on his estimating rightly, that is, as a jury subsequently estimates, some matter of degree."

Nash v. United States, 229 U. S. 373, 377, 57 L. Ed. 1232, 1235.

B. Section 2141 Has a Plain, Simple Meaning.

In determining whether a statute is invalid on the ground of vagueness, the applicable standard is not one of wholly consistent academic definition of abstract terms; it is rather, the practical criterion of *fair notice* to those to whom the statute is directed. The particular context is all important.

> *American Communications Assn. v. Douds*, 339 U. S. 382, 94 L. Ed. 925.

The plain words of a statute must be given the meaning naturally attributable to them.

> *United States v. Resnick*, 299 U. S. 207, 81 L. Ed. 127.

Furthermore, the rule of strict construction of criminal statutes does not require that the narrowest technical meaning be given to the words employed, in disregard of their context, and in frustration of the obvious legislative interest.

> *United States v. Corbett*, 215 U. S. 233, 54 L. Ed. 172;
>
> *United States v. Bramblett*, 348 U. S. 503, 99 L. Ed. 594;
>
> *United States v. Taylor*, 352 U. S. 407, 1 L. Ed. 2d 430.

The language used in similar statutes has been judicially construed by the Supreme Court of the United States.

> "... any person shall be regarded as practicing medicine within the meaning of this act ... who ... or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical de-

formity or injury, by any system or method, or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation."

Collins v. Texas, 223 U. S. 288, 56 L. Ed. 439.

A statute which permitted the State Board of Dental Examiners to revoke the license of any dentist for gross violations of professional duties or for incompetency, was held to be not so indefinite as to violate the due process clause.

State Dental Examiners v. Saville, 90 Colo. 177, 8 P. 2d 693, 82 A. L. R. 1170. Appeal dismissed: 287 U. S. 562, 77 L. Ed. 496.

Every human utterance is fair game for semantic quibbling. To this, Section 2141 must fall prey. This is a far cry from the disability in a reasonable man to discern whether or not the words used charge a public offense. The mandate is simple: Don't practice medicine without a license.

III.

The Procedural Guarantees of Due Process Were Not Offended in the Trial of This Cause.

A. Exclusion of Evidence at the Trial of Petitioner Is Not a Proper Issue to Be Considered by This Court.

The scope and meaning of a state statute, as indicated by the exclusion of evidence on the ground of its incompetency or immateriality under that statute, is conclusive on the federal courts in determining the question of validity of the statute under the federal constitution.

Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643.

IV.

The Application of Section 2141 of the Business and Professions Code of the State of California to the Petitioner Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

The mere fact that so-called drugless practitioners may currently escape prosecution under Section 2141 for *ultra vires* acts, does not give the chiropractor grounds to complain because he falls within its scope. A chiropractor has different rights, powers, privileges and immunities from the "drugless practitioner." He is governed by the results of an initiative election, rather than by a legislative fiat. He is not accountable to the California Board of Medical Examiners, as are the so-called drugless practitioners. He has limitations, as do midwives and chiropodists.

Furthermore, there is no right to practice chiropractic. It is a mere privilege that can be withdrawn by the People of California.

A statute is constitutional when it applies uniform rules of conduct for all those coming within the scope of its application and may not be challenged because of any denial of "equal protection of the law" to those on whom it operates, because others differently situated and within a different legal classification may not be affected by its terms.

People v. Sullivan (1940), 60 Cal. App. 2d 539, 141 P. 2d 230.

There is no violation of equal protection where a legislative discrimination reflects the fact, in legislative beliefs, that evils in the same field are of different dimensions and proportions, requiring different remedies, or when the discrimination occurs as a consequence of reformative legislation which takes one step at a time

and addresses itself to the phase of the problem which seems most acute to the legislative mind.

Williamson v. Lee Optical of Oklahoma, 348 U. S. 483, 99 L. Ed. 563.

The deference due to the judgment of a state legislature in the matter of statutory classification alleged to deny equal protection of the laws, is especially to be observed when local conditions, which the court cannot know, may affect the answer to the critical question of whether the court can say, on its judicial knowledge, that the Legislature could not have had any reasonable ground for believing that there were such public considerations as to justify the distinction made.

Dominion Hotel v. State of Arizona, 249 U. S. 265, 63 L. Ed. 597.

The Legislature is free to recognize degrees of harm; a law which hits the evil where it is most felt will not be overthrown because there are other instances to which it might have been applied.

West Coast Hotel v. Parrish, 300 U. S. 379, 81 L. Ed. 703.

While the Constitution, in enjoining the legal protection of the laws upon states, precludes irrational discrimination as between persons and groups of persons in the incidence of a law, it does not require situations which are different in fact or opinion to be treated in law as though they are the same.

Goesaert v. Cleary, 335 U. S. 464, 93 L. Ed. 163.

The only common denominator to which petitioner can claim membership is as a "drugless practitioner."[1] This label is a fiction. He is a chiropractor.

[1] "Drugless Practitioners" were abolished in 1949 by Sec. 2232, Business & Professions Code (Stats. 1949, c. 233, p. 458, sec. 5).

V.

Conclusion.

The Petition for Writ of Certiorari or review does not disclose a clear and convincing showing that there has been a violation of the petitioner's constitutional rights under the Federal Constitution. It represents merely a plaint of dissatisfaction with California judicial interpretation of its own law by a person whose license in the healing art exists solely by virtue of a privilege.

Petitioner's apparent desire as manifested by the allegations of his petition was succinctly disposed of years ago by Mr. Justice Holmes in *Collins v. Texas* (223 U. S. 288, 56 L. Ed. 439, 444), with the observation:

> "In short, the statute says that if you want to do what it calls practicing medicine, you must have gone to a reputable school of that kind of practice."

Respectfully submitted,

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APPENDIX "A".

SECTION 17

(Stats. 1917, Ch. 81, p. 114)

Any person who shall practice or attempt to practice, or who advertises or holds himself out as practicing, any system or mode of treating the sick or afflicted in this state, or who shall diagnose, treat, operate for, or prescribe for, any disease, injury, deformity, or other mental or physical condition of any person, without having at the time of so doing a valid unrevoked certificate as provided in this act, or who shall in any sign or in any advertisement use the word "doctor," the letters or prefix "Dr.", the letters "M.D.", or any other term or letters indicating or implying that he is a doctor, physician, surgeon, or practitioner, under the terms of this or any other act, or that he is entitled to practice hereunder, or under any other law without having at the time of so doing a valid unrevoked certificate as provided in this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished as designated in this act.

APPENDIX "B".

Minutes

DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION ONE
Los Angeles, July 30, 1959.

Crim. 6798—*In re Dayan* on Habeas Corpus. The Court: Upon the authority and for the reasons state in *People v. Fowler*, 32 Cal. App. 2d Supp. 737 and *People v. Mangiagli*, 97 Cal. App. 2d Supp. 935, the petition for writ of habeas corpus is denied. White, *P. J.*